SUPREME COURT, U. S

FILED

OCT 3 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1856

GILBERT BRYANT FOERSTER, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO MEMORANDUM OF THE UNITED STATES

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In its memorandum, the United States suggests that disposition of this petition should be deferred pending action, assumed to be favorable, and disposition of two petitions filed by the government in *United States v. Ortiz,* No. 73-2050 and *United States v. Peltier,* No. 73-2000. As explained below, the government's suggestion would result in piecemeal resolution of the issues spawned by *Almeida-Sanchez v. United States,* 413 U.S. 266, and would not insure resolution of the Circuit conflict now existing on the issue of the retroactivity of *Almeida-Sanchez.* Peti-

tioner believes that the most efficient course would be to grant the present petition alone (and defer the government's) or grant all three petitions.

I

United States v. Peltier No. 73-2000, does not deal with a fixed checkpoint. There is thus no opportunity presented in that case to consider the application of *Almeida-Sanchez* to such checkpoints. This critical question is presented by the present petition, and should be resolved as soon as possible.

Peltier held *Almeida-Sanchez* retroactively applicable to roving searches. Whether such retroactivity is appropriate involves, among other things, questions as to the function of intermediate court decisions on the issue. The Ninth Circuit divided sharply on this question. Resolution of the question should come only after review of both the roving and fixed checkpoint cases, which review would be appropriate in deciding the issues presented by the present petition.

In *United States v. Ortiz,* No. 73-2050, the government is arguing that warrants are not required for fixed checkpoint searches. Resolution of that question in favor of the government would not dispose of the present petition, because Petitioner is asserting that probable cause or its equivalent is required for a search even if a warrant is not, see Petition, p. 17.

The government's alleged "retroactivity" issue in *Ortiz* appears fictitious: first, it is arguing that *Al-*

meida-Sanchez should not be applied *prospectively;* second, the government's argument is premised on the conclusion that a warrant requirement now exists for fixed checkpoints in the Ninth Circuit. This is not the case. See *United States v. Bowen,* ____ F.2d ____ (C.A. 9, 5-9-74), Petition, Appendix A.

No issue in *Orti* addresses itself to the scope of retroactivity *Almeida-Sanchez* should be afforded. Only a limited question is presented by *Ortiz;* further aspects of the difficult question of retroactivity can only be considered pursuant to the present petition.

What the government is suggesting is that questions of the applicability of *Almeida-Sanchez* to fixed checkpoints and its retroactivity be decided without the perspectives of the variety of viewpoints available to the Court. The government would appear to prefer piecemeal litigation. Petitioner suggests strongly that this would be inefficient and inappropriate.

II

Resolution of the issues raised by *Ortiz* and *Peltier* will not necessarily resolve the conflict now existing among the Circuits. As noted in the present petition, pp. 10-11, the Fifth, Ninth, and Tenth Circuits are in conflict as to the retroactivity application of *Almeida-Sanchez* to fixed checkpoints. *Peltier* does not deal with fixed checkpoints. The government's "retroactivity" argument in *Ortiz* is in reality an attempt to limit the *prospective* application of *Almeida-Sanchez,* it does not deal with either full or partial retroactivity.

Thus, it is perfectly possible that the conflict among the Circuits will not be resolved by the granting of the government's petitions. The present petition, however, squarely presents the issue of retroactivity as well as the issue of the application of *Almeida-Sanchez* to fixed checkpoints.

Therefore, Petitioner continues to urge that his petition be granted.

Dated, Oakland, California,
October 1, 1974.

Respectfully submitted,

ARTHUR WELLS, JR.,
Attorney for Petitioner.